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| EXAMINER | |
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| FEACHER, LORENA R | |

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* BRIDGET MARY EVENS, BEVERLY ALICE ELMSHAUSER, IMTIAZ ANWAR, KARRIE HAUGEN, NATASHA WERNER, KATHERINE GRACE PHILLIPS, and KARINA NELSON

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Appeal 2016-005330
Application 12/720,178[1]
Technology Center 3600

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Before JOHN A. EVANS, SCOTT E. BAIN, and JASON M. REPKO, *Administrative Patent Judges*.

EVANS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants seek our review under 35 U.S.C. § 134(a) of the Examiner's Final Rejection of Claims 1 to 5, 7 to 14, 16 to 18, and 20, all claims pending in the application. App. Br. 9. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.[2]

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[1] The Appeal Brief identifies Target Brands, Inc., as the real party in interest. App. Br. 2.

[2] Rather than reiterate the arguments of Appellants and the Examiner, we refer to the Appeal Brief (filed October 4, 2015, "App. Br."), the Reply Brief

## STATEMENT OF THE CASE

The claims relate to a distribution server configured to coordinate the distribution of products to multiple retail locations. *See* Abstract.

## INVENTION

Claims 1, 11, and 17 are independent. An understanding of the invention can be derived from a reading of Claim 1, which is reproduced below with some formatting added:

> 1. A computer configured to implement a method for distributing products to retail locations, the method comprising:
>
> receiving data associated with a product and retail locations at which the product is to be sold;
>
> recognizing an event predicted to affect sales of the product at one or more of the retail locations;
>
> identifying, with a computer, sales data for the product at each of the retail locations;
>
> forecasting sales of the product at each of the retail locations based at least in part on the identified sales data and the recognized event;
>
> identifying, with a computer, receiving attributes of each of the retail locations,

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(filed April 25, 2016, "Reply Br."), the Examiner's Answer (mailed March 18, 2016, "Ans."), the Final Action (mailed April 21, 2015, "Final Act."), and the Specification (filed March 9, 2010, "Spec.") for their respective details.

wherein the receiving attributes are premised at least in part on unload schedules and stocking times,

wherein unload schedules and stocking times include a prediction of the period of time between the arrival of a delivery vehicle and the stocking of a product;

determining, with a computer, a confidence level for each of the retail locations, based at least in part on the identified receiving attributes, wherein the confidence level is associated with a probability that the product will be stocked at the retail location at a particular time;

determining, with a computer, a quantity of the product to be delivered to each of the retail locations based at least in part on the forecasted sales;

identifying a plurality of distribution agents;

determining, with a computer, a distribution agent for product distribution based on the delivery capabilities of the distribution agent;

prioritizing, with a computer, distribution of the product to each of the retail locations based at least in part on the identified receiving attributes and the determined confidence levels and adjusting the determined quantities of the product to be delivered;

determining, based on unload schedules and stocking times for a certain retail location, that a quantity of product to be sent to the certain retail location is subject to lost sales;

routing the quantity of product determined to be subject to lost sales to one or more different stores that are predicted to unload and stock the quantity of product in time to capitalize on potential sales; and,

generating a first distribution order increasing the number of units for at least one of the distribution agents for delivery of determined product quantities to at least one of the retail locations and generating a second distribution order decreasing the number of units for at least one of the distribution agents for

delivery of determined product quantities to at least one other of the retail locations.

*Rejection*

Claims 1–5, 7–14, 16–18, and 20 stand rejected under 35 U.S.C. § 101 as directed to non-statutory subject matter. Final Act. 4–5.

ANALYSIS

We have reviewed the rejections of Claims 1–5, 7–14, 16–18, and 20 in light of Appellants' arguments that the Examiner erred. We have considered in this decision only those arguments Appellants actually raised in the Briefs. Any other arguments which Appellants could have made but chose not to make in the Briefs are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). We are not persuaded that Appellants identify reversible error. Upon consideration of the arguments presented in the Appeal Brief and Reply Brief, we disagree with Appellants that the claims recite statutory subject matter under 35 U.S.C. § 101. However, we agree with the Examiner that all the pending claims are unpatentable under 35 U.S.C. § 101. With respect to the rejections under 35 U.S.C. § 101, we adopt as our own the findings and reasons set forth in the rejection from which this appeal is taken and in the Examiner's Answer, to the extent consistent with our analysis below. We provide the following explanation to highlight and address specific arguments and findings primarily for emphasis. We consider Appellants' arguments *seriatim*, as they are presented in the Appeal Brief, pages 9–42.

CLAIMS 1–5, 7–14, 16–18, AND 20: NON-STATUTORY SUBJECT MATTER

*Step 1: Abstract Idea.*

The Examiner finds the claims are directed to the abstract idea of distributing products to retail locations. Final Act. 3. The Examiner finds Claim 1 does not include additional elements that are sufficient to amount to significantly more than the abstract idea because the recited computer performs generic functions, such as receiving data regarding a product, analyzing data associated to with the product, forecasting sales and determining distribution agents, which are well-understood, routine and conventional activities previously known to the pertinent industry. The Examiner finds these activities are basic input/ output and data analysis functions that an ordinary computer would be programmed to perform in implementing the abstract idea. *Id.*

The Examiner's analysis joins Steps 1 and 2. Appellants' traversal relates to Step 2 of the *Alice* analysis, the search for an inventive concept, and seems to concede the Examiner's finding of an abstract idea at Step 1. *See* App. Br. 12. Moreover, we agree with the Examiner that the claims are directed to an abstract idea.

*Step 2: Inventive Concept.*

Appellants discuss Supreme Court and Federal Circuit precedent and conclude "the second step of *Alice* (i.e., a search for an **inventive concept** in the claims of the subject patent application) cannot be performed without

considering the admitted novel and nonobvious nature of the claimed invention." App. Br. 12. Appellants "further point[] out that the finding that all pending claims recite novel and unobvious features after a thorough and comprehensive search **directly refutes** the rejection of all pending claims under 35 USC§ 101. *Id.* at 13. We disagree.

Appellants "argue[] that this approach improperly imports into § 101 the considerations of 'inventiveness' which are the proper concerns of §§ 102 and 103. This argument is based on two fundamental misconceptions." *Parker v. Flook*, 437 U.S. 584, 592 (1978). Appellants "incorrectly assume[] that if [their claimed method] implements a principle in some specific fashion, it automatically falls within the patentable subject matter of § 101 and the substantive patentability of the particular process can then be determined by the conditions of §§ 102 and 103." *Id.* at 593. "This assumption is based on [Appellants'] narrow reading of [Supreme Court precedent], and . . . would make the determination of patentable subject matter depend simply on the draftsman's art and would ill serve the principles underlying the prohibition against patents for 'ideas' or phenomena of nature." *Id.*

As explained by Judge Reyna, the "abstract idea exception prevents patenting a result where 'it matters not by what process or machinery the result is accomplished'." *McRo, Inc. v. Bandai Namco Games Am. Inc.*, 837 F.3d 1299, 1312 (Fed. Cir. 2016) (quoting *O'Reilly v. Morse*, 56 U.S. 62, 113 (1854)).

Appellants must, but do not, point to specific limitation(s) in their claimed method to show "how" their claimed goal is accomplished. "A

claim is 'directed to' an abstract goal if the claim fails to describe *how* – whether by particular process or structure – the goal is accomplished." *Id.*

## DECISION

The rejection of Claims 1–5, 7–14, 16–18, and 20 under 35 U.S.C. § 101 is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED